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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Statement of Interest

In certain circumstances a federal common law public nuisance action may be the only path open to a state government which seeks to resolve an urgent interstate conflict. For this reason, we have chosen to offer a hypothetical fact situation which we believe forcefully illustrates the extent of our interest in this case. The fact situation outlined below incorporates elements of typical cases which the New York State Attorney General faces daily, and which constitute a compelling interest in the issues to be decided in this case.

Suppose that a corporation operates a toxic waste disposal site on the border of an adjacent state near a navigable waterway. The wastes being treated at the site are compounds which include many chemicals. Research conducted by a federal government has documented serious health hazards posed by many of these chemicals. Some of these are not regulated by the United States Environmental Protection Agency (EPA), though many are scheduled to be controlled eventually. The use of some of the chemicals not regulated by EPA is controlled by the U.S. Occupational Safety and Health Administration and the Food and Drug Administration.

The company's existing disposal methods do not meet federal or New York standards, nor do they measure up to industry endorsed practices for the chemicals which EPA does not regulate. The company does meet the adjacent state's less stringent standards. Toxic materials from the company site have been traced to the drinking water of several New York towns and to fish in the adjacent waterways. The company is a viable profit-making venture.

On the facts as stated, New York would have a clear and legitimate interest in attempting to convince this company to establish greater control over its effluents. Equally clearly, failing informal resolution of the problem, New York's interest would have to find expression either in a federal administrative action, or in an action in federal court. New York submits that both routes, rather than merely the former, must remain fully available.

Summary of Argument

The federal common law of public nuisance is part of the underlying legal context on which the Federal Water Pollution Control Act was superimposed. 33 U.S.C. § 1251 *et seq.* (FWPCA, Clean Water Act or Act) Implementation of the FWPCA is intended to be a national reform

project which will compliment and supplement the common law, not supplant it. The Act explicitly preserves all common law actions and provides no basis for excepting federal common law nuisance claims from this provision. Congress intended that the courts continue to develop the common law.

The FWPCA directs EPA to set minimum standards and encourages the states to set stricter standards. The Act also requires EPA to gradually tighten pollution control requirements until no pollutants are discharged. Petitioners describe water pollution problems and the regulatory scheme in an extremely general and theoretical fashion. They conclude from this superficial description that the regulatory tools are sufficient, but that they would be destroyed by any parallel exertions on the part of the federal courts. This view is facile and shortsighted. As a practical matter, the federal common law of public nuisance and the FWPCA do not conflict with or undermine one another. In the past, federal courts and agencies have worked together to achieve the goals of the FWPCA. Congress intended that this partnership continue and grow.

In addition, a state suffering an injury from an out-of-state source has a constitutional guarantee of a federal forum to seek an appropriate remedy. The states have not delegated to the federal government, but have retained, the *parens patriae* responsibility to protect the health and welfare of their citizens. As a matter of law, the FWPCA cannot foreclose an action by a state executive to pursue a remedy in federal court for an interstate nuisance.

The Court should decisively reject the proposition that the FWPCA "tolerates a certain risk of harm" to humans and that the common law remedies interfere with the "efficient operation of the regulatory scheme" and "upset the reasonable expectations" of enterprises which discharge pollutants. Mid-American Legal Foundation Brief, p. 9. The Attorney General of the State of New

York submits that we have not arrived at such an Orwellian state of affairs that the citizens' ancient remedies have been abandoned in favor of abject dependence on the federal bureaucracy. Congress never intended that the FWPCA supplant common law remedies designed to protect health and property, but instead that it would augment them. Congress has instituted a national cleanup campaign, which will eventually tolerate *no* risk of harm from water pollution. In the meantime, it has left individual remedies intact.

I The Language of the Act Makes It Clear That the Statute and the Common Law are Complimentary and the Common Law Is Not Restricted

The FWPCA expresses a clear intention that federal courts continue to develop and apply the federal common law in water contamination cases. It would be surprising indeed if Congress had purported to abolish the federal common law of nuisance. The currents of American law have swelled increasingly with statutory laws, but this proliferation has in no way reduced the significance of the common law, which remains an important and fundamental part of our legal system. The federal common law of nuisance is far from an anomaly or vestige in the statutory context. Rather, it is a basic and vital part of the framework into which the FWPCA was written.*

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* The term "pre-emption" most appropriately describes the action of federal law occupying a particular subject matter area and foreclosing state law in that field. Congress has not pre-empted state law with respect to water quality regulations and this is not a pre-emption case. 33 U.S.C. § 1370.

Wisconsin argues that considerations of comity should influence the federal courts to refrain from applying federal common law in water contamination cases, because the legislature has enacted a statute in this subject area. Wisconsin Brief, p. 22 *et seq.* Such judicial deference might be appropriate if the two sources of law did indeed clash and if Congress had expressed an intention to foreclose common law actions in federal court. Neither of these conditions exists here.

In contrast to the common law's conservative, case-by-case approach, the FWPCA is a project-oriented statute, which attempts to effect a sweeping national reform as expeditiously as possible. Congress designed the FWPCA as a two-part enterprise: first, a massive clean-up and, thereafter, a regulatory scheme enabling the maintenance of these improved conditions. The statute relies in large part on general rules and standards to accomplish these objectives. *E.I. du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 116 (1977). However, these are not the exclusive means to be used.

Congress recognized that there would be variations from the average and situations which could not be foreseen when the statute was written. Moreover, when an agency is delegated to implement a statute, there will always be regulatory lag before the agency can reach problems which do not seriously affect the majority of citizens, even though they may very critically affect a minority.* In these situations, the FWPCA provides that affected groups retain recourse to the courts to litigate any common law claims they may have.

The FWPCA's savings clause, Section 505(e), evinces a clear intention not to foreclose any cause of action which presently exists:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any

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* For example, EPA's program for regulating toxic discharges, pursuant to 33 U.S.C. § 1317, consists of a schedule which attempts to study and address the national problem industry by industry and toxic by toxic. This means that the largest industries discharging the greatest quantity of the most hazardous substances will be regulated first—a logical approach for an agency with limited resources and national responsibilities. *Natural Resources Defense Council* v. *Train,* 8 E.R.C. 2120 (D.D.C. 1976). 10 *Natural Resources Lawyer* 507. It means, however, that small local industries may not be reached by EPA for many years, even though they may be operating negligently and damaging the health and ecology of many of their neighbors.

> statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . . 33 U.S.C. § 1365(e)

The Senate Report, which is the acknowledged source of the section 505 savings provisions, states:

> . . . It should be noted, however, that the section would specifically preserve any right or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under the Act would not be a defense to a common law action for pollution damages.*

The court below correctly explained the logic of including the federal common law of nuisance in the savings provision:

> . . . There is nothing in the phrase "any statute or common law" that suggests that this provision is limited to state common law. There is no reason to believe that Congress would have wished to preserve state common law claims and preclude federal common law claims. The preservation of all existing remedies is consistent with the recognition in this Act of the value of public participation in all aspects of the effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," exemplified by the direction to EPA and states participating in the national discharge permit system to encourage such participation. (Citation omitted)
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> *People of the State of Illinois* v. *City of Milwaukee,* ("Illinois v. Milwaukee") 599 F. 2d 151, 163 (7th Cir. 1979)

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* *Legislative History of the Water Pollution Control Act Amendments of 1972,* prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, January 1973, Vol. 2, p. 1499.

The court's holding was clearly correct, as there is no basis for distinguishing the federal common law from the state common law in this context.

Petitioners argue erroneously that subsection 402(4) exempts permit holders from common law actions otherwise allowed by § 505. Petitioners brief, p. 40. In fact, § 402(k) states:

> Compliance with a permit issued pursuant to this section *shall be deemed compliance,* for purposes of section 309 and 505, *with sections 301, 302, 306, 307, and 403,* except any standard imposed under section 307 for a toxic pollutant injurious to human health . . . .
>
> 33 U.S.C. § 1342(k) (Emphasis added)

Thus, it is apparent that compliance with a permit does not constitute compliance with all of § 505, but merely with sections 301, 302, 306, 307 and 403. Petitioners' reading of 402(k) would result in the nullification of § 505(e), which was obviously not intended.*

The rule is well established that statutory repeals of the common law by implication are not favored. A statute is not to be construed as taking away a common law right unless that result is absolutely required, as when continuance of the right would render a statutory provision entirely ineffectual. *Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779, 783 (1952); *Jamison* v. *Encarnacion,* 280 U.S. 635, 640 (1930); *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.,*

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* In another context in the FWPCA, Congress specifically provided that § 404 dredge and fill permits would be conclusive as to the effect of the permitted activity on water quality, for purposes of the Act of March 3, 1899. 33 U.S.C. § 1371. This exemption demonstrates that Congress did provide for specific legal effects of permits where it wished to do so.

It is also worth noting that § 402(k) provides that these permits shall not be final, even for their own duration, for purposes of allowing continued discharge of toxic pollutants injurious to human health. 33 U.S.C. § 1342(k).

204 U.S. 426, 437 (1907); *Sierra Pacific Power Co.* v. *Federal Power Commission*, 223 F. 2d 605 (D.C. Cir. 1955), aff'd 350 U.S. 348 (1956). In the present case, where Congress has explicitly preserved the common law, there is simply no basis for interpreting a repeal.*

Consistent with normal legislative practice, Congress clearly meant to do here only what it consciously and specifically did in writing the Act. Moreover, Congress did not revise, delete or modify the savings clause when it revised the Act in 1977. Obviously, Congress was un-

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* Most of those lower federal courts which have dealt with this matter have held that FWPCA does not foreclose common law nuisance actions or at least that the federal district courts have jurisdiction to address the question. As the district court expressed in its holding in *United States ex rel. Scott* v. *United States Steel Corp.*, "... [w]e do not find any provision in [the FWPCA Amendments of 1972] which proposes to abolish the Federal common law of nuisance but rather an intention to supplement and amplify any preexisting remedies. ... (Citations omitted.)" 356 F. Supp. 556, 559 (N.D. Ill. 1973)

Petitioners cite two cases in support of their argument that the federal courts have no power to apply common law in interstate water pollution cases, but these do not stand for that proposition. *Committee for the Consideration of the Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006 (4th Cir. 1976), concerned intrastate pollution and the court held that the plaintiffs must therefore bring their common law claims in state court. 539 F. 2d at 1007, 1010. In *New England Legal Foundation* v. *Costle*, 475 F. Supp. 425 (D.C. Conn.) —— F. 2d —— (2nd Cir. 1980) (decision reserved pending the decision of the Court in the instant case), the district court did not find that the common law had been preempted, but exercised its equitable discretion in the light of the facts in that particular case, not to devise a remedy, finding instead that the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, provided an entirely adequate remedy at law. 475 F. Supp. at 441.

Petitioners' also cite *Arizona* v. *California*, 373 U.S. 546 (1963), for the proposition that once Congress has enacted legislation on the subject of interstate waters, this law is automatically to be applied in the place of previously applicable common law. In that case Congress developed a formula for apportioning the limited waters of the Colorado River among several states and directed the federal agency to implement it. The FWPCA is an entirely different sort of law: it recognizes and actively encourages development of many different approaches to ending water polluation.

willing to make sweeping changes which would abolish any common law right of action.* This Court should give effect to the Congressional purpose, as the court did below.

II The Federal Common Law of Nuisance Does Not Conflict With the Regulatory Scheme

The FWPCA established a regulatory process in which evolution and variety of standards are required. The federal courts are equipped to develop common law remedies in this context without interfering with EPA's operations.

It is surely significant that EPA has not only *not* disapproved the remedy in this case, but has expressed active support of it, through the participation of the United States as *amicus* in support of Illinois. Indeed, EPA itself has pressed federal common law nuisance claims. *United States* v. *Outboard Marine Corp.*, 12 ERC 1348 (N.D. Ill. 1978); *United States* v. *Hooker Chemicals & Plastics Corp., et al.*, Civil Actions Nos. 79-987, 79-988, 79-989 and 79-990 (W.D.N.Y.) EPA is clearly not concerned that its ability to function will be interfered with by such actions. Instead, it sees the common law as an additional tool, to be used when and as appropriate—a sensible and practical view.

A. The Act Provides For Evolution And Variety Of Water Pollution Controls

Petitioners claim that the FWPCA established a uniform, final and exclusive scheme by which pollutant dis-

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* Limiting the common law nuisance cause of action might well lead to ramifications outside of the area of water pollution or even of nuisance law. Moreover, even if Congress had intended to limit the common law of nuisance, its power to do so would be limited. Prof. Prosser states that in general, American legislatures have ". . . power to authorize minor interferences with the convenience of property owners, but not major ones. . . ." Prof. William J. Prosser, *Law of Torts*, West Publishing Co., 1964, p. 628.

chargers could plan their activities. Petitioners' Brief, pp. 3, 18, 27. This construction of the Act is erroneous and illusory. It is obvious from the Act itself and from its legislative history, as clearly set forth in the opinion of the Court of Appeals, that its aim is simply to achieve clean water as soon as possible. It does not purport to give pollutors any abstract rights. In particular, the Act promises neither absolute uniformity nor finality on the broad sense suggested by petitioners. Permits are not granted as general defenses to any claim to imposition of stricter standards.*

The regulatory scheme establishes uniform minimum standards and encourages stricter variations. Petitioners misinterpret the intent of the Act and its legislative history on this point. The law and legislative history set out in petitioners' brief, pp. 28-32, explicitly supports this interpretation of the law, and not the theoretical "uniformity for uniformity's sake" which petitioners would have us believe insulates them from any obligation to reduce polluting effluents. See, e.g., *Natural Resources Defense Council* v. *Costle,* 568 F. 2d 1369, 1378 (D.C. Cir. 1977) and *Natural Resources Defense Council* v. *Train,* 510 F. 2d 692, 711 (D.C. Cir. 1975).

Authority to promulgate uniform standards was delegated to EPA in order to insure that the parochial interests which might dominate some states could not lead

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* Permits and licenses are by their nature limited: "Wherever possible the authority given will be construed to permit only reasonable conduct of the enterprise in a reasonable manner, with proper care and due regard for the interests of others. . . ." Prosser, *op. cit.* at p. 628. Also see *Phalen* v. *Virginia,* 49 U.S. (8 How.) 163, 167-68 (1850). In addition, any exemption afforded by a license extends only so far as the express or necessarily implied grant contained in the license. A license may not be pleaded as a general defense. It must be apparent that the legislature contemplated the doing of the very act which occasions the injury which is claimed to be a nuisance. *Richards* v. *Washington Terminal Co.,* 233 U.S. 546, 552; (1914).

to less stringent standards which could undercut the pollution control efforts of their neighbors. EPA has therefore set national *minimum* standards. Those states which wish to go beyond the minimum are encouraged to do so by the FWPCA.* 33 U.S.C. § 1370.

The Act directs EPA to "average" the pollution problem, in order to address it from a national perspective, and to incorporate general health and other scientific judgments into standards. 33 U.S.C. § 1314. Such standards are necessarily based on an average of the water problems across the country. However, this use of averaging does not mandate overall uniformity in EPA's rules. The averaging is not the end of the FWPCA; it is simply a tool.

Wisconsin concedes that the stricter standards set by states pursuant to the FWPCA are "a logical part" of the "uniform" statutory scheme "because they promote more vigorous anti-pollution efforts where circumstances warrant." Wisconsin Brief, p. 10. Surely this is the same goal sought by a federal court when applying the common law, which is a result clearly contemplated by § 505(e) of the Act. Congress clearly contemplated the use of a wide variety of approaches to water pollution problems.

Petitioners also argue that the FWPCA National Pollution Discharge Elimination System (NPDES) is intended to provide polluters with certainty concerning future pollution control requirements.** 33 U.S.C. § 1342. The

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* Indeed, the FWPCA actively encourages individual approaches to water quality control. The Act designates the Great Lakes and several other water bodies as in need of special attention. 33 U.S.C. § 1254(e) and (f), 1257, 1258, 1263; also § 1314. The states are encouraged to go beyond EPA rules. 33 U.S.C. § 1370. In addition, many of the statutory provisions providing for the issuance of research grants are designed to encourage innovation on individual projects. 33 U.S.C. §§ 1254(h), (g), 1255.

** Petitioners' Brief, p. 32, *et seq.;* also, Illinois State Chamber of Commerce, p. 20, *et seq.;* and National League of Cities and U.S. Conference of Mayors Brief, p. 8.

NPDES permit system is not static. Congress created a dynamic scheme which would require polluters to upgrade controls as technology improved. 33 U.S.C. § 1370, 1254, 1255, 1256. EPA itself is required to foster evolution of technical standards. 33 U.S.C. §§ 1311(d), 1314(a), (d), and (f). Moreover, the entire first subchapter of the Act promotes research programs. 33 U.S.C. § 1251 *et seq.*

The Act provides only limited finality for permit holders. This Court has recognized that the extent of the insulation provided by the Act in § 402(k), 33 U.S.C. § 1342(k), is limited to ". . . compliance with those sections of the Amendments on which the permit conditions are based." *EPA* v. *State Water Resources Control Board,* 426 U.S. 200, 205 (1976). The permit defines and facilitates enforcement of most but not all of a discharger's obligations under the Amendments:

> . . . The purpose of § 402(k) seems to be to insulate permit holders *from changes in various regulations during the period of a permit* and to relieve them of having to litigate *in an enforcement action* the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving the permits finality.
>
> *E.I. du Pont Nemours & Co.* v. *Train, supra,* 430 U.S. at 138, n. 28. (Emphasis added)

Thus, the assurances granted by permit are limited to actions taken pursuant to the Act itself and to the duration of the individual permit.* The context within which Congress wrote the FWPCA remains highly variable.

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* In addition to common law nuisance claims and to EPA actions which will implement improvements in pollution controls, there are other potential sources of change in pollution control requirements. For example, other common law tort actions, such as negligence and wrongful death, may lead to court orders that pollution controls be upgraded. State laws and local ordinances

(footnote continued on following page)

There is no basis for petitioners' argument that they are entitled to uniform standards or to some sort of finality.

B. The Courts Will Apply the Federal Common Law of Nuisance Within the Statutory Framework

There is no reason to expect that the federal courts will apply the common law so as to undermine EPA regulations. In the instant case, the district court set standards which went beyond the EPA standards, but the Act intended that some pollution sources would be subject to stricter standards than EPA established for the majority. 33 U.S.C. § 1370. The court of appeals also looked to the statute for guidance and accordingly modified the district court's remedy in light of the statute and EPA regulations.*

(footnote continued from preceding page)

may also be changed to require stricter controls, a process for which Congress has provided. 33 U.S.C. § 1370. Moreover, in a mandamus action, local, state or federal standards might be overturned on the ground that essential health considerations, perhaps newly discovered, must be taken into account in setting such standards. The future adequacy of pollution control expenditures may be affected by numerous sources of law, none of which were abolished by the FWPCA.

* In addition, contrary to petitioners' suggestion, the Court of Appeals took into account the cost/benefit analysis presented to the district court. 599 F. 2d at 173. Petitioners argue that Congress concluded that the federal courts are not equipped to make decisions regarding water pollution control. Petitioners' brief, p. 30. This is clearly not the case as Congress has provided that these courts should apply the common law and review the agency's decisions. 33 U.S.C. § 1365. Tort actions are often complex and involve technical questions, yet the federal courts regularly address them. There is no reason to distinguish a nuisance action relating to water contamination from other tort cases. Moreover, the federal courts have at their disposal Federal Rule of Civil Procedure 53, which provides for the appointment of special masters. This tool allows a court to pick a competent and highly trained expert in the field to hear testimony, make findings of fact and advise the court in those areas in which it might otherwise be unfamiliar.

The Seventh Circuit opinion addressed the distinction between established common law actions and statutory enforcement actions and it discussed the concept of "common law of the statute." The latter phrase refers to the court's role in making case law which specifically fills in interstices in a statute. This case law is developed pursuant to the principles and goals of the relevant statute. *Illinois* v. *Milwaukee,* 599 F. 2d at 163-64. In the instant case, the court below drew upon the FWPCA, as well as the common law of nuisance, to address the unique facts of this case. The Seventh Circuit's opinion is a particularly appropriate judicial use of the two sources of law.

While Congress clearly intended EPA to be the primary vehicle for implementing the national water quality cleanup, there is no basis whatsoever for arguing that Congress intended to preclude the federal courts from exercising their own skills in situations which call for other or additional remedies than those available to EPA.

Petitioner also makes much of the economic difficulties which municipalities face in bringing their sewage disposal practices into conformance with federal law. Petitioners' Brief, pp. 42 *et seq.* Even assuming that such difficulties confront many municipalities, these financial burdens certainly vary widely in amount, nature and duration. There is no reason to allow all municipalities to shield themselves with the financial weakness of a few. Moreover, an individual defendant's financial ability to abate a nuisance would be a proper issue for a court in a tort action.*

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* This principle is particularly important where a polluter has failed to operate in as clean a manner as is reasonably practicable. Pollution may be caused by a private industrial concern and may take its toll in health or economic costs, which should not be left to be borne by neighboring citizens.

Professor Prosser discusses the kinds of balancing judgments which are appropriate in a nuisance case. ". . . There is no liability for nuisance unless the defendant's conduct is unreasonable

(footnote continued on following page)

III. The Constitution Guarantees State Governments a Federal Forum In Which To Seek a Remedy for An Interstate Nuisance.

Article III of the United States Constitution provides the states with recourse to the federal courts for redress of injuries caused by out-of-state sources.* This forum is an essential underpinning of the federal system. The Union rests on the ability of the system to accommodate differences and maintain harmony.

(footnote continued from preceding page)

under the circumstances." Prosser, *op. cit.*, at 602. The fact that nuisance claims are measured in part by negligence standards is an important facet of the common law of nuisance. Prosser, *op cit.*, p. 598. A permit does not give its holder the right to unnecessarily interfere with the rights of others. Negligent conduct thus may cause an actionable nuisance, in spite of any permit or license. The FWPCA sets a minimum level of pollution control. It does not provide a general license to negligently pollute without regard to harm to others.

* The Court has discussed its discretion not to exercise its original jurisdiction in all cases. *Ohio* v. *Wyandotte Chemicals Cargo*, 401 U.S. 493 (1971); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). In *Ohio* v. *Wyandotte*, the Court explained that it would decline to accept a case brought by a state only when it could ". . . say with assurance that . . . declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant. . . ." 401 U.S. at 499. In that case, because no federal question was raised by the bill of complaint, the petitioner was left to pursue its remedies in its own court system, even though the respondents were located in Canada and a neighboring state. See 1972 *Wisconsin Law Review* 597, 607-8.

In *Illinois* v. *Milwaukee*, one year later, the Court decided that the federal common law of public nuisance is included in the phrase "laws of the United States", in 28 U.S.C. § 1331(a), which establishes the original jurisdiction of the federal district courts. The motion for leave to file a bill of complaint was therefore denied without prejudice to bringing the action in the district court. This decision better serves the principles underlying Article III than does *Wyandotte*. This is because the federal district court has jurisdiction over all the parties within the United States and has no reason to discriminate in favor of one locality over another. *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 289 (1888).

In *Missouri* v. *Illinois,* 200 U.S. 496 (1906), the Court held that a federal common law of nuisance must exist to redress an affront to a state's physicial integrity, such as water pollution, which is caused by a party in a neighboring state. Writing for the Court, Justice Holmes reasoned that a sovereign which was not a member of the Union might go to war with a neighbor to end such a nuisance. The states, in forming the Union, relinquished this prerogative in exchange for a federal judicial forum. 200 U.S. at 520-21 (1905).*

The Court has many times enumerated the constitutional limits which circumscribe the exercise of Congressional power to regulate interstate commerce, the authority underlying the FWPCA. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), is particularly relevant here. In that case, the Court held that to the extent that the Fair Labor Standards Act Amendments of 1974 operated to directly displace the states' freedom to function in traditional

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* In a later air pollution case, Justice Holmes described a suit by state for an injury to it as brought in its capacity as *quasi*-sovereign:

> . . . In that capacity the State has an interest independent of and behind the titles of its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of its forests and its inhabitants shall breathe pure air. . . .
>
> . . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.

Missouri v. *Illinois,* 180 U.S. 208, 241.
Georgia v. *Tennessee Copper Co.,* 206 U.S. 230, 237 (1907).

Accord, *Kansas* v. *Colorado,* 206 U.S. 46, 98 (1907); *New York* v. *New Jersey,* 256 U.S. 296, 301-2 (1921); *Nebraska* v. *Wyoming,* 325, U.S. 589 (1945); *State of Texas* v. *Pankey,* 441 F. 2d 236 (10th Cir. 1971).

governmental roles, the statute was invalid as not within the authority to regulate interstate commerce. 402 U.S. at 852, 858.

The controversy in *National League of Cities* v. *Usery,* concerned the breadth of the Congressional power to regulate the state's participation in interstate commerce as employers.* The present case presents a clearer issue. The state function at issue here lies at the very heart of governmental function. When a state acts as *parens patriae* to abate an injury to its physicial integrity, it is not engaging in commerce. Rather, it is functioning as a sovereign, which not only may, but *must,* act to protect the health and welfare of its citizens.

The states have retained both the authority and the responsibility, as *parens patriae,* to use the police power when necessary to protect the health and welfare of citizens. *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 257 (1972); *State of West Virginia* v. *Chas. Prizer & Co.,* 440 F. 2d 1079 (2nd Cir.), *cert.* denied *sub nom. Colter Drugs Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *Cities Service Oil Co.* v. *Roberts,* 62 F. 2d 579 (10th Cir. 1933); *Board of Supervisors of Fairfax County, Virginia* v. *U.S.,* 408 F. Supp. 556, 566 (E.D. Va. 1976). In the latter case the district court explained the meaning of the phrase *parens patriae:*

> The term literally means 'parent of the country' and traditionally refers to the role of the state as sovereign and guardian of persons under its protection. [Citations omitted] Thus, the concept of *parens*

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* The case prompted a concurring opinion and two dissents. Concurring, Mr. Justice Blackmun read the majority opinion not to ". . . outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and state facility compliance with imposed federal standards would be essential. . . ." 426 U.S. at 856. New York agrees with this statement and notes that, in the present case, Illinois is not resisting compliance with federal standards, but is seeking to supplement them, as Congress has encouraged it to do. 33 U.S.C. § 1370.

> *patriae* is closely linked to that of sovereignty and has been most frequently applied when a state seeks to prevent or repair harm to its quasi-sovereign interests. *Hawaii* v. *Standard Oil Co.*, 405 U.S. at 258, 925 Ct. 885 (1972) and cases cited therein.
> 408 F. Supp. at 566.

While the states primarily attend to problems wholly within their borders, interstate conflicts do occasionally arise in which the health and property of one state's citizens are endangered by activities conducted in a neighboring state. As the Seventh Circuit stated below:

> . . . We can think of no other reason for Congress preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy.
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> *Illinois* v. *Milwaukee, supra,* 599 F. 2d at 165.

The state government is the sovereign that is charged with the *parens patriae* responsibility. If the Court were to hold that the federal common law of public nuisance has been restricted by the FWPCA Amendments, it would leave state governments at the mercy of the EPA's limited power and discretion to remedy environmental health problems. Moreover, such a holding would also result in a violation of the states' Constitutional right to seek redress of significant injuries in a federal forum, which in certain circumstances is an essential precondition to a state's exercise of its *parens patriae* responsibilities.

The right of states to local self-government is protected by the Constittuion. Each state and region exists in an idiosyncratic ecology, with particular geographic resources upon which its survival depends. Also, each local economy is different from the next and interacts differently with its physical and social environment. The Court has

recognized this practical reality in an analogous context. In *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), addressing an air pollution problem, the Court noted that ". . . geophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution. . . ." The Court held:

> As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations. (Footnote omitted) . . .
> 406 U.S. at 115-16.

Each state has a unique environmental setting and is responsible to its citizens for preserving it. The initiative of the state government in addressing local health and environmental problems is an essential governmental function which must be respected. Chief Justice Chase declared, in *Texas* v. *White*:

> . . . [i]t may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.
>
> 74 U.S. (7 Wall.) 700, 729 (1868).

In a case which concerned a closely related question, the Second Circuit Court of Appeals upheld water pollution control measures which were stricter than EPA standards and said:

> By the contemplation of minimum federal standards . . . Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it is indisputable that Congress specifically declined to

> attempt a pre-emption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards. (Citations omitted)
>
> *Mianus River Preservation Committee* v. *EPA*, 541 F. 2d 899, 906 (2nd Cir. 1976).

The Court in that case found that Congress had explicitly encouraged states to legislate independently of EPA.

The Attorney General for the State of New York submits that Congress intended that state executives be independent in their pursuit of improved water quality. Both the Constitution and the FWPCA require that the states retain the option of going to federal court to seek a remedy for an injury which EPA has not addressed or has addressed inadequately.

Conclusion

WHEREFORE, the Attorney General for the State of New York respectfully submits that the Corrt should affirm the decision of the court below.

Dated: New York, New York

Respectfully submitted,

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